Supreme Court, U.S.
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No. 87-156

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

W. T. "BUTCH" BURNS, *et al.*,
Petitioners,

v.

DELMAR-WEST LAMAR INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals for the Sixth Judicial District at Texarkana

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Respondents' Brief in Opposition to Petition for Writ of Certiorari

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ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Whether Tex. Rev. Civ. Stat. Ann. art. 717m-1, Sec. 8, violates the Due Process clause of the 14th Amendment to the United States Constitution, because it requires a party who wishes to oppose the issuance of a public entity's bonds to post a bond in the amount of the damages that would be incurred by delay, if, after a preliminary hearing, the opposing party is unable to show facts which would be sufficient to warrant a temporary injunction against the issuance of the bonds.

LISTING OF PARTIES

W. T. "Butch" Burns, Ted Carrington, Dwight Stegall — Plaintiffs/Appellants/Petitioners

Frank D. Moore — Attorney for Plaintiffs/Appellants/Petitioners

Delmar-West Lamar Consolidated Independent School District and the members of its Board of Trustees (now known as the Chisum Independent School District) — Defendants/Appellees/Respondents

Mary Milford of the Law Offices of Earl Luna, P.C. — Attorney for Defendants/Appellees/Respondents

The Honorable Jim Mattox, Attorney General of the State of Texas — Intervenor

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	2
The Appeal Should be Dismissed for Lack of Jurisdiction	3
Reasons Why the Writ Should Not be Granted	4
Conclusion	8
Certificate of Service	9
Appendices:	
Opinion in W. T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District, 720 S.W.2d 836, (Tex. App. — Texarkana 1980, writ ref'd n.r.e.)	A-1
TEX. REV. CIV. STAT. ANN. art 717m-1, Sec. 8	B-1

TABLE OF AUTHORITIES

Page

Buckholts Independent School District v. Glaser, 632 S.W.2d 146 (Tex. 1983) 5

City of Austin v. Asmussen, Cause No. 14,267, in the Court of Appeals for the Third Supreme Judicial District, at Austin, writ ref'd n.r.e., appeal dismissed 106 S.Ct. 35 (1985) 6

Hicks v. Miranda, 422 U.S. 332 (1975) 6

Boddie v. Connecticut, 401 U.S. 371 (1971) 6

Lindsey v. Normet, 405 U.S. 56 (1972) 7

V.A.T.S. Article 717m-1, Sec. 8 ..... *passim*

28 U.S.C. 1275(2) 2

Rule 296 Texas Rules of Civil Procedure 3

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioners seeking review of the Judgment of the Texas Court of Appeals for the Sixth Judicial District at Texarkana.

STATEMENT OF THE CASE

Petitioners[1] are seeking review by to this Court from the Texas Court of Appeals' dismissal of their case for want of jurisdiction. A copy of the state court Judgment appealed from is reprinted as Appendix A. On November 2, 1985, the Delmar-West Lamar Consolidated Independent School District[2] held an election which approved the issuance of $2,500,000.00 worth of bonds for purposes of building a new high school. The vote was 309 in favor of the bonds and 211 against the issuance of the bonds. Petitioners filed suit contesting the election held by the school district in *W. T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District,* Cause No. 51860. The school district replied to the election contest and filed suit for a declaratory judgment, pursuant to V.A.T.S. Article 717m-1, to determine the legality and validity of the bonds and all proceedings, including the election, affecting the bonds. *Ex Parte Delmar-West Lamar Consolidated Independent School District,* Cause No. 51980. The cases were consolidated. The attorney general was served, as required by statute, and answered.

The school district made a motion, authorized by Article 717m-1, Sec. 8, to require Petitioners to post bond should they not be able to show sufficient facts as would warrant the issuance of a temporary injunction against the issuance of the bonds. The Motion was heard and both sides pre-

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[1]This Court has docketed this case as a Petition for Certiorari. However, since jurisdiction of this Court has been invoked pursuant to 28 U.S.C. 1257(2) which is the jurisdictional statute for direct appeals, Respondents are treating this case as both a direct Appeal and Petition for Certiorari.

[2]By resolution of the Board of Trustees of the Delmar-West Lamar Consolidated Independent School District dated August 21, 1986, the district was renamed Chisum Independent School District. Its territorial limits remain unchanged.

sented testimony and evidence. On April 8, 1986, at the end of the bond hearing, the Court entered an Order requiring the Petitioners to post a bond within ten days or be dismissed from the case. On April 22, 1986, the Court dismissed Petitioners from the case for their failure to post the required bond. On April 24, 1986, the trial court entered a Judgment declaring the bonds, and all actions taken or affecting them, including the election, to be valid and legal. On July 18, 1986, Petitioners posted an appeal bond appealing from the Order of April 22, 1986, dismissing them from the consolidated suit. The appeal was heard by the Texas Court of Appeals for the Sixth District on a Transcript of the pleadings only and oral argument, since Petitioners did not have the court reporter prepare a Statement of Facts setting forth the testimony and evidence adduced by both parties at the April 8, 1986, hearing. Nor did Petitioners request the Judge to make Findings of Fact in regard to the April 8, 1986, evidentiary hearing, as authorized by Rule 296 of the Texas Rules of Civil Procedure. The Court of Appeals dismissed the appeal for want of jurisdiction because the Petitioners failed to perfect their appeal from the April 8, 1986, Order requiring them to post the bond. Petitioners appealed to the Texas Supreme Court for a Writ of Error which was refused. This appeal followed.

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. 1257(2) which provides for review by this Court:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

The decision appealed from in this case was not a decision on the federal constitutionality of Article 717m-1, Sec. 8;

rather, the decision was simply a dismissal of the appeal for want of jurisdiction. Petitioners failed to follow the proper state court procedure to appeal their case. This is not subject matter for a direct appeal to this Court. While Petitioners questioned the constitutionality of Article 717m-1, Sec. 8, at the district court level and attempted to again question the constitutionality at the appellate level, the appellate court was unable to reach this point because the Petitioners did not follow the simple procedural process established for appealing a case in state court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Article 717m-1, Tex. Rev. Civ. Stat. Ann. is a detailed statutory proceeding established to provide a rapid method of determining the validity of securities proposed to be issued by a public entity such as the Respondent school district. It authorizes the filing of a Petition by a public entity to obtain a declaratory judgment regarding the legality and validity of the proposed bonds. A key provision of the procedure is found at Sec. 8 of Article 717m-1, which authorizes the court, on motion of the school district to set and require the posting of a bond by the parties opposing the issuance of the securities. For the convenience of this Court, Sec. 8 of Article 717m-1 is reprinted as Appendix B. The purpose of the bond is to protect the school district against the damages it will incur due to the delay caused by the opposing parties continuing what is basically a meritless case. The trial court cannot require a bond if the opposing parties show any merit to their case. As stated by Article 717m-1, Sec. 8, the trial court is required to set a bond:

> Unless at the hearing on the Motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities . . .

Furthermore, the bond is payable only if the opposing parties actually lose the case after a trial on the merits.

The entirety of Article 717m-1, including Sec. 8 dealing with the bond procedure, has been held to be constitutional in respect to both the Texas Constitution and the United States Constitution. The Supreme Court of Texas, in *Buckholts Independent School District v. Glaser,* 632 S.W.2d 146 (Tex. 1983), addressed the constitutionality of the statute at length and found no constitutional defect, stating:

> The taxpayers' basic right to prosecute a lawsuit does not insulate them from damages caused to the public agency if this suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction.
>
> * * * * *
>
> . . . it was not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for the damages accruing solely because of the pendency of this suit, to be paid *only if* the contestant should be *unsuccessful* in the suit. We agree with the trial court's determination that a legislative purpose in enacting the statute was to stop "the age old practice of allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit . . ." We find no denial of due process in the legislature's provision of a bond for damages to stop the abuse.

Petitioners in this case had their opportunity to show some merit to their case at the hearing held before the trial court on April 8, 1986. They were unable to do so. Their case was so meritless that they would not even bring forth a Statement of Facts to the Court of Appeals in Texas so that appellate court, or this Court, could review and determine whether or not the trial court erred in its evaluation of the evidence presented to it. This is a case of the age old practice of allowing, in this case, three disgruntled taxpayers to stop an entire bond issue by simply filing suit.

The constitutionality of Article 717m-1, Sec. 8, was also placed before the United States Supreme Court in the direct appeal from state court of *City of Austin v. Asmussen,* Cause 14, 267, in the Court of Appeals for the Third Supreme Judicial District, at Austin, writ ref'd n.r.e. This Court dismissed the appeal for want of a substantial federal question at 106 S.Ct. 35 (1985). Such a dismissal of a state court appeal is a decision by the Supreme Court on the merits. *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281 (1975). In *Asmussen, supra,* (the decision is reprinted in Petitioners Brief) the Court predicated its decision that Article 717m-1 was constitutional on the facts that:

> First, the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second. if a bond is imposed, an appeal from that determination is available.

Petitioners, who admitted at page 15 of their Brief that they did have a hearing, were unable to show any merit to their case which would have entitled them to a temporary injunction against the issuance of the bonds. Furthermore, they did not avail themselves of the appeal that was available to them to question the imposition or amount of the bond. Petitioners have been given the basic elements required by due process, that of notice and hearing. The fact that they were unable to prevail at the trial court or refused to follow the procedural mechanism for a constitutional decision at the appellate level is not a violation of the due process clause.

The provisions of Article 717m-1 offer an opposing party to the validation of the securities a full and fair hearing before he is required to post the bond, thereby meeting the requirements of due process established in *Boddie v. Connecticut,* 401 U.S. 371 (1971). The amount of the bond is directly related to securing the financial risk to the public

agency caused by the participation of the opposing party in the proceedings. See *Lindsey v. Normet,* 405 U.S. 56 (1972).

Petitioners totally disregard these decisions and instead rely solely on the 1978 district court decision in *Pine Township Citizens Association v. Arnold,* 453 F.Supp. 594 (W.D. Penn — 1978), which is clearly distinguishable from the present case. It involved a state statutory requirement for a rather substantial bond to be posted by the Petitioner from any zoning decision *regardless of the merits of the appeal.* The only holding made by the court was that the case did present a federal question which required the convening of a three-judge court to determine the issue. The Court carefully noted that the Supreme Court had not decided that issue or a similar issue. This Court has decided that the bond requirements of art. 717m-1, the statute in question, in this case do not present a substantial federal question. Also, as both the *Buckholts* and *Asmussen* decisions pointed out, the bond is *only* required when the opposing party cannot show merit to its case.

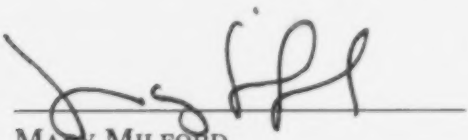
It should be noted, that this is Petitioners' second "bite at the apple" in their attempt to get this Court to review this case. In addition to this state court case contesting the election, Petitioners also filed suit in federal District Court in regard to the November 2, 1985, election which approved the bonds, alleging that the election was held in violation of the Voting Rights Act and seeking to enjoin the state court proceedings by alleging that Article 717m-1 was unconstitutional. In that case, the District Court dismissed, the Court of Appeals for the Fifth Circuit summarily affirmed and this Court refused Certiorari. *W. T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District,* No. 86-1337 in the United States Supreme Court, October Term, 1986. Respondents request this Court to again dismiss the Petitioners case as meritless.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request this Court to deny this Petition for a Writ of Certiorari in this case.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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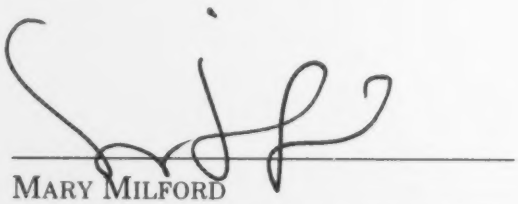
CERTIFICATE OF SERVICE

I, Mary Milford, counsel of record for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondents Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served, by depositing three copies of Respondents Brief in Opposition to Petition for Writ of Certiorari in the United States mail, on this 24 day of August, 1987, with first-class postage, addressed to Mr. Frank Moore, Attorney at Law, 41 West Side Square, Cooper, Texas 75432, counsel of record for the Petitioners, and to Mr. Leroy Grawunder, Assistant Attorney General, 201 Barton Springs Road, Austin, Texas 78701.



MARY MILFORD
Counsel of Record for Respondents

APPENDIX

Court of Appeals
Sixth District
Texarkana, Texas

No. 9511

W. T. "BUTCH" BURNS, TED CARRINGTON AND DWIGHT STEGALL

Appellants

v.

DELMAR-WEST LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

Appellee

Appealed from the 62nd Judicial District Court of Lamar County, Texas

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This is a school bond election appeal. Because the appellants have failed to follow the mandates of Tex. Rev. Civ. Stat. Ann. art. 717m-1, § 8 (Vernon Supp. 1986), we dismiss the appeal for want of jurisdiction.

In response to the appellant taxpayers' election contest, the appellee school district answered and filed a separate suit seeking a declaratory judgment that the bond proceedings were valid pursuant to Tex. Rev. Civ. Stat. Ann. art. 717m-1 (Vernon Supp. 1986). The two causes were consolidated. The trial court then granted the school district's motion to require the appellants to post bond as authorized by Article 717m-1, § 8, and entered an order to this effect dated April 8, 1986. The appellants were dismissed for failure to post the bond on April 22. It is from the April 22 dismissal that the appellants bring this appeal.

Article 717m-1, § 8, in relevant part reads as follows:

> In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after

> entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, ... In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, ...

Appellants neither posted the bond nor appealed from the April 8 order requiring such bond. Article 717m-1, § 8, therefore operates to deprive this Court of jurisdiction to consider the appellants' contentions. *Buckholts Independent School District v. Glaser,* 632 S.W. 2d 146 (Tex. 1982); *Rio Grande Valley Sugar Growers v. Attorney General,* 670 S.W. 2d 399 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

Appellants contend, however, that the statute unconstitutionally deprives them of due process because it requires the posting of a bond before a final determination of the merits and as a prerequisite to an appeal, even though the plaintiffs may be unable to make the bond.

The constitutionality of these provisions has been upheld against similar attacks. *Buckholts Independent School District v. Glaser,* supra; *Rio Grande Valley Sugar Growers v. Attorney General,* supra. The statute does not expressly deny a waiver of the bond for indigents. *Buckholts Independent School District v. Glaser,* supra. Appellants were afforded a hearing on the feasibility of a bond being required, yet there has been no evidence brought forward here tending to show that they are indigent and no claim of indigency is raised here.

Appellants also argue that the judgment is void, and for that reason it can be attacked on the merits here, even though they did not avail themselves of the right to appeal the judgment in the manner provided by the statute. They base their argument on the contention that the school district was not a legal entity and therefore could not call a valid election.

As the court had jurisdiction of the proceedings and the parties below, its judgment was not void. If, as appellants urge, the judgment was erroneous, their remedy was to appeal by following the statute. Failing to do so, they cannot now challenge the issues which were or could have been raised in the proceeding below. *Burris' Estate v. Associated Employers Insurance Co.*, 374 S.W. 2nd 223 (Tex. 1963); *Ex parte Sutherland*, 515 S.W. 2d 137 (Tex. Civ. App.-Texarkana 1974, writ dism'd); 48 Tex. Jur. 3d *Judgments* § 277 (1986).

The appeal is dismissed at appellants' costs.

WILLIAM J. CORNELIUS

William J. Cornelius
Chief Justice

October 21, 1986
Filed October 21, 1986

Publish

TEX. REV. CIV. STATS. ANN. — Art. 717m-1

Bond

Sec. 8. At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing party or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court shall then issue an order directed to the opposing party or intervenor, which order, together with a copy of the motion, shall be served on the opposing party or intervenor, or on his attorney of record, personally or by registered mail, requiring the opposing party or intervenor to appear at the time and place, not sooner than 5 nor later than 10 days after entry of the order, as the court may direct, and show cause why the motion should not be granted. Motions with respect to more than one opposing party or intervenor may be heard together if so directed by the court. Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court in its discretion may receive evidence at the hearing or any adjournment with respect to the amount of the damages and costs, which shall include but not be limited to anticipated

increases in interest rates and in construction and financing costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings, but may fix the amount of the bond to be posted by a particular opposing party or intervenor only if a motion as described in this section was made and granted as to the opposing party or intervenor. In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court, unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised by an opposing party or intervenor as to whom no motion was made hereunder. An order of the court fixing the amount of the bond to be posted by an opposing party or intervenor or denying the motion of a public agency or dismissing a party for failure of file a bond may be appealed as provided in Section 9 of this Act. The court to which any appeal is taken may modify the order of the lower court and may enter the modified order as the final order. In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised in the proceedings by an opposing party or intervenor as to whom no motion was made hereunder. It is further provided that, on motion of the public agency, the court shall proceed without delay to hearing and trial on the merits of the public agency's petition, regardless of the pendency of an appeal from any order entered pursuant to this section.

Appeal

Sec. 9. Any party to the cause, whether the public agency, a defendant, intervenor, or otherwise, dissatisfied with any order entered paramount to Section 8 of this Act, or with the judgment in the declaratory judgment action, may appeal therefrom to the appropriate court of civil appeals after the entry of the order or judgment, or the order or judgment shall become final. The appeal shall take priority over all other cases, causes, or matters pending in the court of civil appeals, except habeas corpus, and it shall be mandatory that the court of civil appeals assure the priority and act thereon and render its final order or judgment therein with the least possible delay. The Supreme Court shall have authority to review, by writ of error or other authorized procedure, all questions of law arising out of the orders and judgments of the courts of civil appeals in the cases, in the manner, time, and form applicable in other civil causes where a decision of the court of civil appeals is not final, but any such review shall take priority over all other cases, causes, or matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment therein with the least possible delay. Also, Rule 499a, Texas Rules of Civil Procedure, shall apply to proceedings in the district court, but any direct appeal thereunder shall take priority over all other cases, causes, and matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment with the least possible delay.